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WHAT SHALL WE DO WITH THE DIRECT ACTIONIST?

At a recent meeting of the Missouri Bar Association at Kansas City the following resolution was, after much debate, passed by a large majority:

Whereas, the Constitution of the United States, and the Constitutions of the several states of the Union, make ample provision for changes or repeal through the exercise of lawful methods in fundamental laws of the United States and of the several states; and

Whereas, both federal and state governments have established, and so maintain, ample agencies through which changes in the law or repeal may be effected; and

Whereas, all classes of people have the right to avail themselves of the ballot, free speech, and other lawful agencies, to accomplish such changes or repeal; and

Whereas, the use of physical force and violence to accomplish such changes in the law or repeal are unnecessary and un-American;

Now, Therefore, Be It Resolved: by the Missouri Bar Association, in regular meeting assembled, as follows:

That, the Missouri Bar Association hereby recommends to the Congress of the United States and to the Legislatures of each of the states in the Union, the passage of laws which shall, respectively, in substance, provide as follows:

That, any person who shall, privately or publicly advocate, either verbally or in writing, or attempt to bring about by individual action or by combining with others, any changes in or nullification of our laws, constitutional or statutory, state or national, by means of physical force or violence, shall be punished by imprisonment at hard labor, or, in the case of aliens, by deportation.

This resolution is being passed around the bar associations. We have received communications from lawyers in different states, some asking us to favor it; others, to oppose it, on various grounds. California, we are informed, has recently enacted into law the substance of the resolution, and some attorneys of that commonwealth have written us expressing doubt as to its constitutionality and even as to its expediency.

We have hesitated to express an opinion on this matter, hoping that we could find someone to explain to us the real purpose or necessity of the resolution. Some have answered our inquiry by saying that it was intended to oppose any effort to change or nullify law or legal institutions by force. If that were its purpose we would be for it heartily, although we might doubt that there was a need for such a law. Surely any offenses which would come within the terms of such a resolution would find a place in some one of the following category: treason, sedition, outlawry, resisting an officer, or contempt of court. But the resolution does not oppose the employment of force in making legal changes; it seeks to prevent the advocacy of force for such purposes. What is this but a new sedition law? Sedition laws are always unpopular, and very seldom accomplish their purpose. They tend to interfere with the constitutional right of free speech and there is no right more sacred than that in the popular regard, and, we may add, there is no provision so important to the safety of the government. The right of free speech is the safety valve of a democracy. Interfere with that right and you drive the diseases of the body politic within, where they accumulate force and become deadlier in their effect.

This resolution, however, is no doubt more indirectly aimed at the "soviet" propaganda now alleged to be spreading over the country in a series of "parlor" meetings. It is alleged that in some places some educated men are engaging in these discussions as an intellectual pastime. But if there is anything being said or done at these meetings or elsewhere in the country to encourage anyone to take up arms against the country or by force to withstand constituted authority, the most expedient thing in a democracy is not to cover it up, but to

bring it to the light of day. A thing like that cannot stand the light.

Moreover, it is not the appeal to force that is dangerous; but the appeal to class hatred and jealousy which inflames the passions of men and leads them to effect their will by force. It is not the appeal of the mob leader to lynch some poor wretch that leads the mob to take his life, but the vivid picture of the crime which the leader has presented. The crowd sees "red" and acts without judgment. The mob around Pontius Pilate cried, "Crucify Him, crucify Him," although the Judge withstood them. When Anthony gained permission of Brutus to preach Caesar's funeral oration it was not necessary for him to tell the crowd to hang Brutus. It was only necessary for him to paint the foul deed that had been committed by Caesar's "friends." Anthony's method of effectually pointing to Brutus as the guilty man by actually referring to him as an "honorable man," would have escaped any "direct action" statute ever devised, and yet was as effective as if he had urged the mob to follow him to the home of Brutus.

The purpose of the law proposed in this resolution is a good one. Every decent citizen feels the injustice of permitting any one to inflame the passions of the people into rebellion against their own constituted authority. But this law does not accomplish its purpose. It does not prevent incendiary speeches full of untruthful and extravagant statements, but prohibits only an appeal to force. That appeal could be omitted in almost any such speech and still the crowd would act intuitively. In a democracy the most effective method of meeting a situation of this kind is to make a counter-appeal to the electorate. The great majority of our citizens are intelligent and the best way to kill a proposition which is inherently vicious is to uncover its naked repulsiveness to the minds of the people.

Would it not be better for the bar to show its real interest in the people and their problems by encouraging a discussion of these problems and suggesting methods for their relief? Let the lawyer discredit by argument, as he can easily do, the wild-eyed fanatics and professional direct actionists who live on the discontent of the people. The American Bar Association in combating the heresy of judicial recall went direct to the people and by a very effective campaign led by Hon. Rome G. Brown of Minneapolis, they met the reformer on his own ground and showed the people who had been deluded into believing that their courts were antagonistic to the people's interest, that there were no institutions more vital to their interests than the courts, and that the average judge was fair and honest in all his decisions, and that it would be unjust to the judge and injurious to the public interests to compel a judge to justify his decisions on the hustings. The people saw the point and the recall propaganda slowed up to a whisper.

Let us first understand the "soviet" propaganda or any other program for social betterment which involves the vicious element of direct action. Let us then go to the people and show them that all that is good in their program can be accomplished at the ballot box. Let us make clear to them that no minority, whether denominated the proletariat or what not, is entitled to have its way as against the majority, for the simple reason that if we recognize the element of force or direct action to gain for us what we ask, we recognize the right of another minority to take away from us by force that which we have gained. Under such conditions society would soon be disorganized, industry would become discouraged, property and personal rights would be unprotected and abject penury would be the unhappy lot of us all. That argument and others that will readily occur to any student of social conditions would be effective to correct such a condition where a law such as the one proposed would stick in the bark.

NOTES OF IMPORTANT DECISIONS.

SUMMARY JURISDICTION OF COURT TO COMPEL ITS OWN OFFICERS TO DO JUSTICE IS NOT LIMITED BY ORDINARY RULES OF LEGAL OBLIGATION.—Lawyers are familiar with the summary jurisdiction of courts over attorneys and their right to hold an attorney to a greater degree of responsibility than others, but that this rule should be applied to all officers of the court has not been made as clear as the recent English case of Re Thellusen, 147 L. T. 292, makes it.

In the Thellusen case it appeared that in November, 1918, the debtor asked one A., with whom he had become acquainted in the preceding month, to lend him the sum of £1000 to enable him to discharge a pressing debt. A. consulted his solicitor, and found that he could only raise the money by insuring his own life and mortgaging the policy of life assurance. He therefore stipulated that the debtor must agree to repay not only the £1000, but also the expenses of effecting the assurance, including the premium paid thereunder. Pending the effecting of the assurance A. paid £100 to the debtor on account by means of a promissory note guaranteed by his solicitor, and the transaction was completed on the 3rd January, 1919, by the advance by A. to the debtor of the further sum of £900 on the latter executing an agreement of that day by which he bound himself to pay to A. the sum of £1272 on the 3rd July, 1919, with interest at 6½ per cent. The sum of £272 was the amount of the premium and expenses above referred to. The sum of £900 was paid to the debtor's bankers. Out of it they repaid themselves the amount of an overdraft due to them on the debtor's banking account, leaving a balance of £764 0s. 5d. in their hands. It subsequently appeared that unknown to A. and his solicitor, and (as was said by the debtor) to him likewise, a receiving order had been made against him on the 2nd January, 1919. A. and his solicitor were also ignorant of the facts that the debtor had committed an act of bankruptcy and that a petition in bankruptcy had been presented, though the latter facts were of course known to the debtor himself. A. stated that had he known that a receiving order had been made he would not have paid the £900 to the debtor, and there was every reason for that statement to be accepted. The official receiver, as trustee in bankruptcy, having required the bankers to pay the £764 0s. 5d. to him and having received it from them, A. applied by motion to the court in bankruptcy that the loan transaction be declared to be void or rescinded, and that the official receiver should repay A. the £764 0s. 5d., which at the date of the application was still in the hands of the official receiver. On May 12, 1919, it was decided by Horridge, J., sitting in bankruptcy, that A's motion must be dismissed with costs.

The Court of Appeals, in reversing the judgment of the lower court, declared that "the circumstances of the case justified the exercise by the court of the discretionary jurisdiction which it possessed, and which it had often asserted, of directing an officer under its control—in the present case the official receiver acting as trustee in bankruptcy—to pursue a line of conduct which an honest man, actuated by motives of morality and justice, would pursue though not compellable thereto by legal process."

The lower court had acted on the theory that the court should not interfere with the legal title of this fund in which other parties had an interest except upon plain principles of legal obligation. But the appellate court held that a court of equity itself and its officers must take a higher stand and that there was sufficient authority to hold that a trustee or other officer of court "will be ordered to do the fullest equity, even where the circumstances would give rise to no legal right, and, perhaps, not even a right which could be enforced in a court of equity against an ordinary litigant. The court cites the following authorities: Re Condon, 30 L. T. Rep. 773, L. R., 9 Cr. App. 609; Re Carnac, 54 L. T. Rep. 439, 16 Q. B. Div. 308.

This rule goes further than many courts in America would feel safe in going unless under the common law or some statute the plaintiff could prove a good title to the fund. Simply to give him the fund because it would be inequitable or "not in accordance with strict notions of honesty" to permit the receiver to retain it, introduces an uncertain element in the law. The length of the Chancellor's foot is here the only guide to those "strict notions of honesty and justice" which are thus summarily to take a fund away from the trustee and from the beneficiaries.

The receiver in the Thellusen case called the attention of the court to the rule that money paid under a mistake of law cannot be recovered from the person who has received it. The court, however, held that this rule "did not apply where the money has been paid

to and received by an officer of the court as such." So it appears that the rule in the Thellusen case is to be applied only to officers of the court who will summarily be held to the strictest accountability for their acts and may not drive a "sharp bargain" in the interest of the estate or fund which they represent even if they keep within the bare limits of the law. It is hard to understand why these "strict notions of honesty and justice" should not be applied to all alike.

IS ABSENCE CAUSED BY ARREST AND CONVICTION VOLUNTARY?—It is sometimes difficult to define certain words upon which a decision must turn. In the recent case of Kowalski v. McAdoo, 107 Atl. 477, the word which gave the court the most trouble was the word "voluntary." This word was used by the Director General of Railroads in his General Order No. 27, which provided that an increase in wages, effective January 1, 1918, should not apply to certain railroad employes who had "voluntarily" left the service.

The plaintiff in this case, a former employe of the Pennsylvania Railroad Company, was on May 15, 1918, arrested and convicted of stealing a pair of shoes from a car of his employer. He spent seven days in jail by reason of his arrest, and this absence from service was construed as "voluntary" by the Railroad Administration, who refused plaintiff the increased pay. The Supreme Court of New Jersey, who affirmed a judgment in favor of plaintiff, said:

" 'The general tenor of the argument urged upon us to sustain this contention is that to permit the plaintiff to recover retroactive back pay granted by the sovereign power as a reward for loyal service after that employe has robbed his sovereign' would practically allow 'the plaintiff to take advantage of his own wrong and to found a claim upon his own iniquity.' There is no pretense that the plaintiff did not render loyal and efficient service to his employer from January 1, 1918, to May 15, 1918, before he committed the alleged theft. The fact that he was arrested and locked up on a criminal charge was wholly without any significance, unless it was shown that the plaintiff created the situation for the purpose of abandoning the employment of the railroad company. And this does not appear from the evidence. But, on the contrary, it appears that the plaintiff's arrest was caused by the railroad company, his employer, and it is therefore inconceivable upon what plausible ground it can be even argued that the plaintiff left his employment voluntarily."

It is quite evident that the court and the defendant were thinking about two different things. The defendant, as any other employer, had in mind the disloyalty of the employe in stealing from him and objected to any excuse being recognized for the absence due to his arrest. The court had in mind the rights of the plaintiff, which should not be defeated by an absence which was not of his own choosing.

RIGHT OF CORPORATIONS HAVING NON-PAR VALUE SHARES TO DO BUSINESS IN A STATE WHICH REQUIRES PAR VALUE SHARES.—Many new questions presented by the organization of corporations with non-par value shares are demanding adjudication. One of these questions arises when a foreign corporation with non-par value shares seeks to do business in a state which does not recognize such a method of issuing corporate shares. Shall such a corporation be given a license? This was the question presented to the Charter Board of Kansas, who refused to issue a license to the North American Petroleum Company of Delaware, because its shares had no fixed par value.

The board agreed that where there is no fixed par value to stock, it would be difficult for the board to determine the annual fees, and that it would be necessary in every such case for the board to inventory and appraise the assets of the company in order to know the amount of the capital invested. But the Supreme Court of Kansas has overruled the board and, by mandamus, required them to give the application of the North American Petroleum Company the usual consideration and inquiry. North American Petroleum Co. v. Hopkins, 181 Pac. Rep. 625. The court, in that case, had the following interesting comment to make:

"The problem of determining the solvency and *bona fide* capitalization of the plaintiff presents no unusual difficulty. The fact that the shares of its stock have no nominal par value is of little consequence. Any prudent charter board, in determining whether a foreign corporation is worthy of admission to do business in Kansas, would attach little importance to the nominal value of its shares of stock even if they have a nominal value. As in all other cases, the charter board should concern itself earnestly to ascertain the genuine capital—those assets permanently devoted to the corporate business as a basis for its business credit, and upon which its hope of profits is rationally founded. The 'lawfully issued capital' and the 'capital stock' of such corporations are the assets that it devotes to

the prosecution of its business. When the value of those assets is ascertained, the fee, required to be paid by law, can be based on that portion of the assets which the corporation proposes to 'invest and use in the exercise and enjoyment of its corporate privileges within the state.' The defendants contend that the plaintiff is not such an organization as is called a corporation in the constitution and laws of this state. This contention is based on the same facts as are the other contentions just disposed of. The answer to this contention is that corporations without capital stock and without shares of stock are not new; they are as old as corporations themselves, and have existed in England and in this country for many years; our constitution recognizes them and we have laws for their control and government."

THE LAW IS FAIRER THAN MEN.

Universality is coincident with duration; both are found in abstraction. Mutability more readily characterizes that which is practical than that which is impractical. Men are in the habit of calling those things practical which are most accessible and may be enjoyed with least effort. Slight reflection should be sufficient to remind them that such things are also earliest to pass away. Principles are greater than personalities; but because the former are harder to understand, men prefer to judge the latter. But things universal are not interchangeable with things mutable, and hence justice is incapable of being transferred from a province of principles to one of personalities.

Justice, enthroned upon that security which arises from the comparative universality of its validity, serenely gazes upon the passage in review of all the fleeting changes wrought by wars, social and political revolutions, religious polemicisms, and the discoveries of science. The eternal principles of right are its province; and, we should remember, its province alone. As regards the objects of the so-called practical world, these principles do not "change as they change, swerve as they swerve." But they remain the same as man's only security against the manifold of world distortion and contingency.

It is one of the anomalies of history, that in times of stress and strain men seek to do away with that which is universally valid for that which is only temporarily so. This is due in large measure to the incapability of men in such times to accurately reflect upon what they do. But back of such a reason is another which, as a matter of fact, is the real responsibility: the utter failure on the part of the majority of men to develop and sharpen their analytical powers. Their judging faculties being less than they should be, they naturally fall into the error of accepting for their use a thing which is not as good or valid as something else that is offered them. Just at the present time—at the beginning of an era which succeeds a period of world strife and turmoil—there is extant in the world, and quite particularly in America, a surge against the established power of the Law. The conditions under which we have been living have narrowed the visions of men down to the things just beyond their own noses, which is equivalent to saying that men cannot understand why the Law does not accomplish things just like they are accomplished by cannon and shrapnel. It is forgotten that war is intermittent, whereas Law is eternal; and hence that the rules of universality controlling the latter are altogether incapable of being narrowed down to a point where they may be compared with the temporary and even self-destructive principles controlling the former. Men today are expecting the Law to do for them anything they would like to do for themselves, forgetting that the basis of Law is generalization, and that to reduce it to particular ends would be to debase it to selfish aims. The modern charge that the Law and its machinery are nothing but a system of reactionary tyranny, comes from persons, or organizations of them, who expect the Law to contain nothing but that which they see to be pe-

culiarly advantageous to them; whereas all reasoning men know that security for the Law is gone, if it depart from those universal principles which are the guaranty of justice to mankind as a whole. The very gist of the Law's justice lies in its universality.

But these specious charges will cease to be made when men begin to judge principles instead of personalities. Men make such charges because they see the Law as a personal agency or force instead of an abstraction, which it must continue to be if it continue just. The end of the Law is justice and right, which, instead of being a thing which changes with the times and men's dispositions, is an abstract principle that is universal because eternal. The Law has a peculiar province and scope which men have failed to understand. It is laid upon a foundation of detached principle which requires reflection and analysis in order to be comprehended, an attainment in which men have disastrously neglected to school their minds. Men should cease to judge judges and should learn to judge Law. As long as they cannot comprehend the latter, they are not fit to judge the former. They should judge righteous judgment; that is to say, they should judge the right.

Thus we are led to conclude that the chief fault lies in the body politic, and hence that the Law is fairer than men. The body politic still stands within its own purview, while the Law continues its universal sweep. In the Law is justice; but who will say that for selfish, so-called practical men? In the Law is found a guaranty of right; but who would seek for such in men? Of the Law we are not afraid, in the Law we safely put our trust; but, outside of it, who will dare to claim the same for men?

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THE PROPER MANNER OF SUBMITTING MATERIAL TO A TOXICOLOGIST IN MEDICAL LEGAL CASES.

During the eleven years that the writer has occupied the chair of pharmacology and toxicology at the University of Wisconsin, innumerable instances have occurred in which material has been submitted in a manner which precluded proper use of the findings in a court of justice. Failure to comply with the very simple legal requirements may permit the perpetrator of a vile crime to escape justice and leave him free to repeat his act.

In all matters of evidence a court of law insists that the evidence submitted shall have a reasonable degree of trustworthiness. It frequently happens that otherwise perfectly good evidence is rejected by the court because it was obtained under circumstances or is accompanied by conditions which throw a serious doubt upon its trustworthiness and therefore makes it unsuitable and unsafe for the consideration of the jury. The likelihood of questioning the trustworthiness of evidence is especially great in the case of material submitted by experts as a result of examinations and tests made in the laboratory. This is due largely to the fact that the toxicologist does not get the material in the first instance and has no control over it until it reaches his hands. What happens to the material between the time that it leaves the body of the victim and the time that it reaches the hands of the expert has the utmost bearing upon the trustworthiness of the evidence which the expert may be able to give. It is extremely important, therefore, that prosecuting officers, physicians, and others who wish to submit material for the consideration of the pharmacologist and toxicologist should take every precaution to see

that the material is guarded from any possible source of contamination which might tend to cast doubt upon the trustworthiness of his findings.

The legal requirements are as follows: The material obtained at the autopsy table or otherwise should be so handled as to preclude the possibilities that poison might have been added between the time that it left the hands of the physicians who did the autopsy and the time that it reached the toxicologist. There should be no possibility of the material having been tampered with by anyone during this interval. All vessels should be washed or finally rinsed by the physician doing the autopsy so that he may take oath on the stand that they were clean. After removal of the material, the containers should be sealed with sealing wax, *using a characteristic seal.* In the absence of any other seal, the thumb print may be used, but a better method is to buy an ordinary letter seal upon which some extra letters or some plain scratches may be made with any sharp instrument. This will give a seal which is characteristic and which can be produced in court. In some cases the container may be tied with cord in such a manner that the ends of the cord pass through the characteristic seal so that it would be impossible to open the vessel without breaking the seal. Under these circumstances the package may be sent by registered mail or by express enclosed in a second wrapping sealed with the express company's seal. However, in a serious case as in the suspected poisoning of a human being, the material should be brought to the toxicologist by a special messenger who can take oath on the stand that the material could not have been tampered with while in his possession. It is decidedly preferable that each person handling the material be available at the trial so that he may be placed on the stand and take oath as to what happened to the material while in his possession.

How useless it is for a toxicologist to work behind locked doors in such cases in order to prevent the malicious seeding of material by any one interested in obtaining a conviction, unless the material is handled properly before it reaches him. It is as much the duty of the physician and toxicologist to protect the innocent against false accusation of poisoning as it is to obtain the conviction of a guilty individual.

It would be impossible to enumerate the number of instances in which material has been submitted in an improper manner. A few instances might be cited. A knife was submitted with red stains upon it with the request that we determine whether the stains were from human blood. The knife was wrapped in a piece of paper and tied with a string. Anyone interested could have placed blood on this knife in transit. A piece of iron piping which was similarly wrapped was submitted with red spots to be tested for human blood. Gastric contents have been received any number of times in an ordinary bottle wrapped in the most ordinary fashion. It would be simply a waste of time on the part of a toxicologist to examine such material. It is only fair to state that where material has been submitted by prosecuting attorneys in many instances, the manner of submitting the material has been equally bad. Since such cases occur at rare intervals in medical practice, one is likely in the excitement of the moment to throw away all opportunity of obtaining a conviction unless he has the matter constantly in mind. It is to avoid such occurrences that this brief recounting of the experience of one toxicologist is submitted for publication.

The same precaution should be used in submitting pathological, bacteriological, or other material in medico-legal cases.

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THE POWER OF CONGRESS TO DEFINE THE TERM INTOXICATING LIQUOR.

The power of Congress to define the phrase "intoxicating liquor" in the 18th Amendment is established by the following precedents and authorities:

1. A legislative body has power to define terms in a statute which it enacts including the term in a constitutional provision concerning which it is authorized to act.

2. Courts uniformly sustain the proposition that the Legislature or Congress has power to adopt the means necessary or convenient to make its legislative power over a subject effective.

Section 2, of the 18th Amendment, confers on Congress the authority to enact appropriate legislation to enforce the 18th Amendment.

4. In determining what is appropriate legislation, the purpose of the enactments, the lawless character of the subject matter to be controlled and the difficulties attendant upon enforcement are taken into consideration.

I.

The right to define terms in a statute is well established. It has been exercised by state legislatures and by Congress since the beginning of the government. More than 256 terms have been defined by Congress. Many of these terms are found in the Constitution itself. The authority for this action is made clear in the Cyclopedia of Law and Procedure,[1] which says: "Practical construction of constitutional provisions by the legislative department in the enactment of laws necessarily has great weight with the judiciary and is sometimes followed by the latter when clearly erroneous."

The House Judiciary Committee well said in referring to the power of Congress to define these terms: "Every act that it passes is, in effect, an assertion that the Constitution confers power to pass, and is a construction of the terms. To illustrate, Congress has defined the term 'bankrupt,' 'income,' 'involuntary servitude,' 'immigration,' 'insurrection,' 'counterfeiting,' 'equal protection of the law,' and a number of other words and phrases contained in the Constitution. None but the most absurd strict constructionist would contend that Congress must simply repeat the language of the amendment and provide a penalty for violating the prohibition it contains. Such a construction would have penalized the National Government. 'The letter kills, but the spirit giveth life and this nation lives.'"

II.

When a state or the Federal Government has authority to pass a prohibition law it carries with it the power to enact any law having a reasonable relation to the end sought by the original authorized act.

The Supreme Court has repeatedly affirmed the principle laid down in the Purity Tract Company v. Lynch:[2] "When a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

When Congress is given power over a subject matter it exercises the same authority. In the case of Hoke v. Smith[3] the court held that when Congress had power to control a subject matter it could adopt any "convenient" means to accomplish the end. The language of the court is as follows: "Congress may adopt not only means necessary but convenient to its ex-

(1) Volume 8, page 737.

(2) 226 U. S. 192.
(3) 227 U. S. 309.

ercise, and the means may have the quality of a police regulation. * * *"

III.

Congress is specifically authorized by Section 2 of the Amendment to enact appropriate legislation to enforce National Prohibition. In determining what is "appropriate legislation" to prohibit the manufacture and sale of intoxicating liquor, Congress would naturally consider the laws of prohibition states, and the dry territory in states partially under license. Thirty-three state legislatures have enacted State Prohibition laws or law enforcement codes defining the terms. Practically every local option law also defines the term "intoxicating liquor."

Congress has the same power to construe what the people mean by the term "intoxicating liquor" that the courts have in construing the terms of the laws, and take into consideration the conditions under which the law or the Constitutional Amendment was adopted; inasmuch as practically 90 per cent of the territory of the nation was under prohibition, with the definition of intoxicating liquor similar to that found in the Law Enforcement Code, Congress is clearly justified in adopting this definition as a fair expression of what the people purposed to do in ratifying the 18th Amendment.

The House Judiciary Committee made the following observation on this point: "The National Government has for years imposed a tax upon all alcoholic liquors containing one-half of 1 per cent or more of alcohol, and thus recognized this distinction between intoxicating and non-intoxicating liquor. This policy has put a legislative construction on the phrase that has become popularly known and thoroughly understood everywhere. No one who supported this amendment had in mind that there could be any question as to the meaning of the term. It meant to them as it meant to all the people, that all the liquor that has been treated and taxed as intoxicating should be banished, and they are asking Congress to carry out in good faith what everybody understood was the mandate written into the Constitution."

IV.

The purpose of the legislation and difficulties attendant upon its enforcement are vital factors in determining what is appropriate legislation, such as authorized by the 18th Amendment.

The courts hold that the purpose of laws prohibiting the manufacture and sale of liquor is to prevent the use of liquor. The United States Circuit Court of Appeals,[4] in sustaining the constitutionality of the Webb-Kenyon law, said: "In trying to comprehend the legislative purpose in prohibition statutes, it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage."[5]

In order to carry out this purpose State Legislatures and Congress have found that it is necessary to prohibit certain kinds of liquor called "near beer," and in some instances even non-alcoholic liquors have been prohibited because they are similar in name and appearance to intoxicating liquor.

V.

Congress will also take into consideration the fact that the legislation in question operates upon the most lawless and scheming traffic with which the Government deals. Both the courts and legislative bodies recognize this and their judgments are rightly influenced by it. Justice McReynolds, in rendering the opinion in Crane v. Campbell,[6] said: "And, considering the notori-

(4) 219 Fed. Rep. 794.

(5) See also State v. Maine (20 L. R. A. 496); Ex Parte Crane (151 Pac. Rep. 1006); Lincoln v. Smith (27 Vermont, 320 at 337); Marks v. State, 159 (Ala., 71 at page 84); So. Exp. Co. v. Whittle (69 So. 652); State v. Phillips (67 So. 651).

(6) 245 U. S. 304.

ous difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose."

The Supreme Court of Ohio in deciding whether or not beer containing four-tenths of 1 per cent alcohol was intoxicating,[7] said: "The legislature may have heard of 'Bishop's Beer,' 'Friedon Beer,' and later of 'Near Beer,' and concluded that the enforcement of the will of the majority should not be defeated by subterfuge or the juggling in percentages of alcohol, and has said that, for the purpose of carrying out the intention of the people to prohibit the sale of intoxicating liquors, certain beverages shall be legally considered intoxicating, although not so in fact; and malt liquor is one of these so designated. 'Near Beer' being a malt liquor, the statute pronounces it an intoxicating liquor, and made proof of its real intoxicating qualities unnecessary. It is no more protected than 'altogether' beer, and the attempt to evade the law by brewing a 'near' or 'almost' beer is, by Section 3, *supra*, rendered futile."

In the case of United States v. Cohn, the Court of Appeals of Indian Territory,[8] the court said: "No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect and complete an impregnable barrier against the introduction, sale and use of intoxicating liquor in all of its forms and to guard against all of the well-known subterfuges resorted to to deceive courts and juries in relation to the matter."

In the case of Feibelman v. State,[9] the court said: "But if the prohibition should go only to the sale of intoxicating malt liquors, there would be left open such opportunities for evasions and there would arise such difficulties of proof as the law could not be effectively executed."

All of these decisions are based upon the principle that legislative bodies may enact any laws that are necessary in order to make the original prohibition effective and prevent the evasions of the law by liquor dealers.

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(7) 83 Ohio State 68.
(8) 32 S. W. Rep. 38 (2) Ind. Ter.
(9) 130 Ala. 112.

INSURANCE—INCONTESTABILITY.

MacKENDREE et al. v. SOUTHERN STATES LIFE INS. CO. OF ALABAMA.

Supreme Court of South Carolina.
July 14, 1919.

99 S. E. 806.

Where a life insurance policy provided in bold-faced type that it would "be incontestable from date of issue," insurer could not set up a plea of fraud in an action on the policy.

GAGE, J. Action upon two contracts of insurance upon the life of S. Marshall MacKendree. The court directed a verdict for the defendant, upon the ground that the only reasonable conclusion to be drawn from the testimony was that the insured had suicided, which act by the words of the contract avoided the same.

1. A careful consideration of the testimony, after two arguments, brings us to the now settled conclusion that the issue of how the deceased met his death ought to have been submitted to the jury. The presumption of fact is that a man will not take his own life. Every action of a man, voluntary and involuntary, tends to preserve his life. The testimony in this case did not so far and so surely overcome that presumption as to have warranted the court to take issue from the jury.

2. It was suggested by the appellant's counsel that it is incumbent on the defendant to prove beyond a reasonable doubt that the deceased killed himself. So much is not correct; like any other fact in the case, that fact need only to be proved by a preponderance of the testimony. See Hills v. Goodyear, 4 Lea (Tenn.) 241, 40 Am. Rep. 5.

3. The respondent contends further, to sustain the judgment: (1) That the deceased procured the contract to be made by his false and fraudulent answers in the application to questions directed to an inquiry into his former state of health; and (2) that the deceased warranted his answers to be true. Thereto the plaintiff replies that a certain clause in the contract forecloses a consideration of those issues. The following is the clause referred to:

"The policy shall be *incontestable from date of issue*, except for non-payment of premiums, subject, however, in case of misstatement of age to an adjustment of the insurance at the correct age of the insured: Provided that, in the event of self-destruction, whether sane or insane within one year of such date, the company shall be liable only for the amount of the premium paid on the policy."

The five words we have italicized are printed in the policy in bold-faced type.

At the first argument the writer of this opinion was of the mind that the quoted clause did not exclude a plea of fraud. But reflection has led to a different conclusion. Respectable authority has been cited on both sides of the question; and perhaps the weight of numbers is with the insurer. Let the citations be reported.

It is plain that the expressed words of the contract declare that the policy shall "be incontestable from date of issue," it will not be denied by anybody that those words are broad enough to exclude a contest for fraud, and those courts which deny exclusion in such a case do so as a matter of "public policy." That is a wide domain of shifting sands. If such a policy demands the paramount protection of the insurer, then the clause ought not to prohibit the defense. But, if such a policy demands as well the protection of the insured, then the clause ought to have a wider import than the insurer concedes to it.

Thereabout the following reflections are pertinent. The insurer writes the policy, and it should be read most strongly against the writer; policies are usually periphrastic and sometimes ambiguous; the insured must take that tendered or none; propaganda has constituted life insurance to be almost one of the necessities of life; neither the insured nor the selling agent of the insurer are, as a rule, experts in the use of or in the interpretation of language; the ordinary man who buys a policy would judge the clause in issue to mean that which the plain words of it imply, and especially is that true when those words, in the instant case, are printed in bold type; the insurer has unmeasured time before a contract is made to investigate the facts, and to that end the insured is called in the answers to the application to testify against himself; there is no reason why the truth may not be ascertained before as well as after the contract is made; clauses like the instant one are calculated to lure men into taking insurance who would not otherwise do so; differences about the health of the insured affect the very prerequisites of the contract, and are really the only facts to be settled before the contract is made; fraud resides in the intent of a party, and the inquiry about it ought not to be deferred until such time as he who had the intent is dead, and he who reasonably understood that such an inquiry could only be made in his lifetime; the insurer, by practice and experience, always and for its protection anticipates deception by the insured, and sets to work by exhaustive and ex parte methods to discover it; at the close of the inquiry the insurer has stipulated that there shall be no further contest about that matter, and the insured has gone to his death in that belief.

Upon consideration of these matters there is no clear warrant for a court to affirm on which side of the case the largest and best public policies lie. The insurer inserted the clause in the contract; if its allowance by the courts shall promote concealment on the part of those who seek insurance, its disallowance by the court may promote the deception of these seeking insurance, and suggest to the insurer a fabrication of defenses to avoid its contracts. In such a contest we shall take no part, but leave the parties to the words of the instrument. Our former decision of Insurance Co. v. Arnold, 97 S. C. 421, 81 S. E. 964, Ann. Cas. 1916C, 706, though not to the point, looks thitherward.

The judgment of the circuit court is reversed, and a new trial is ordered to be had in conformity to the views herein expressed.

GARY, C. J., and HYDRICK, FRASER, and WATTS, JJ., concur.

NOTE—*Incontestability of Insurance Policy for Fraud.*—It has been held by the majority of the cases that if a policy provides for its being incontestable after a certain period, this is a valid provision in a contract. See Great Western L. Ins. Co. v. Suavely, 206 Fed. 20, 124 C. C. A. 154, 40 L. R. A. (N. S.) 1057, and a very long line of cases cited in L. R. A. 1917E, at page 339. In Kansas Mut. L. Ins. Co. v. Whitehead, 123 Ky. 21, 93 S. W. 609, 13 Ann. Cas. 301, it was said, in speaking of such a provision, so far as

fraud is concerned, that: "Is the clause void as contravening public policy? It is said that as a rule, fraud vitiates every contract, and that a sound morality requires that the court should forbid one's contracting for immunity from the consequences of his own fraud. All this may be admitted to be sound as an abstract proposition, but it does not hold good in the actual affairs of life, when rules must be adjusted to meet conditions, rather than theories. In the case at bar, full force and effect is given to the theory for a specified time—two years—and after that another public policy comes into play, which recognizes the right of the insured, under certain conditions, to contract for peace and for a knowledge that after the stipulated time has expired, neither he, nor, if he be dead, those for whom he has undertaken to provide, shall be put to the expense and trouble of a trial of the question as to whether or not fraud was perpetuated in the procurement of the policy. *This view* does not exclude the consideration of fraud, but allows the parties to fix by stipulation the length of time which the fraud of the insured can operate to deceive the insurer."

In Harris v. Security L. Ins. Co., 248 Mo. 304, 158 S. W. 68, Ann. Cas. 1914C, 648, the Court declares that the rule is as stated above.

Where incontestability from date on ground of fraud is claimed, many cases declare that this is opposed to public policy.

Thus in Reagan v. Union Mut. L. Ins. Co., 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, the court first declaring for validity of incontestable clause for fraud after a specified time, not unreasonably short, because this gives insured a guaranty against expensive litigation and opportunity to company to investigate, then said: "We have been referred to no decision which holds valid a provision that a policy of life insurance shall be incontestable for fraud from the day of its date."

In Mass. Ben. Life Assn. v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261, said, *arguendo*, that: "If, however, the policy stipulated that it should be incontestable from its date, and the insurer should not be allowed any defenses, whether originating in fraud or otherwise, or if it were clear from the very terms of the contract that it was the intention of the parties that fraud should not be a defense, then such a contract would be void as opposed to the policy of the law." Later this doctrine was stated in Welch v. Union Cent. L. Ins. Co., 105 Iowa 224, 78 N. W. 774, 50 L. R. A. 661.

It would seem that upon every principle of the necessity of there being a meeting of minds as prerequisite to the formation of a binding contract, that the principle of fraud vitiating all contracts lies in concealment preventing a full meeting of minds. Of course, if there is an intervening period before a contract becomes incontestable, that depends upon another consideration. A defrauded party agrees he will look out for himself in the meantime and the other party pays for a sort of statute of limitations interposing against all right to question a supposed contract.

C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 172.

Employment; Solicitation; Trade Organization—Circular by trade organization urging its members to concentrate their claims for collection with its designated attorneys, for certain enumerated advantages to the organization and its members.—Disapproved.—Is there any professional impropriety on the part of the lawyers participating in the following practice?

A trade organization prints upon its letterhead the names of its officers and also in similar type the names of its counsel. It writes to its members, with the knowledge and approval of its counsel, a letter in substantially the following form:

"You are advised that Messrs. X Y Z have been appointed general counsel to the A B C Trade Association. There are many advantages to be derived in your placing any claims which you have for collection with Messrs. X Y Z and also in your authorizing them to transmit to the association all knowledge or information which they may gather concerning these accounts. Within the last six months Messrs. X Y Z have reported to the association concerning over 1,500 debtors who have failed to pay their accounts, and the information thus secured has been sent out by the association to its members in various reports. An important source of the credit information that the association obtains for its members is the information thus obtained through the collection department of its attorneys. Whenever an account is turned over to Messrs. X Y Z for collection and they are authorized by the member to do so, they immediately make a report to the association. By this method the association is enabled to keep a thorough check on debtors of members throughout the country. The importance of all the members fully cooperating in the placing of all collection and failure matters with Messrs. X Y Z should be realized by you and the advantages thus gained should be appreciated. Messrs. X Y Z are rendering most efficient service and are accomplishing excellent results. It is suggested, accordingly, that you sign the enclosed form and

forward it at once to Messrs. X Y Z and that you will lend your valuable co-operation to the association by concentrating your claims with its counsel. In doing this you will be assured of securing the best possible results and you will at the same time assist the association in making the most satisfactory reporting service.

"Yours very truly,

"D. E., *Secretary.*"

Form Enclosed.

To X Y Z, Attorneys at Law,

No. ——— St., New York City.

We, the undersigned, do hereby consent that any facts which you may gather concerning any claims turned over to you for adjustment with or for collection against anybody doing business in the ——— industry, shall be reported by you to the A B C Trade Association. This authority shall remain in full force and effect until it is revoked by us in writing.

ANSWER No. 172.

It is assumed that the association exists for a lawful and useful purpose. But in the opinion of the committee, no reason appears why the legitimate aims of the association could not be readily accomplished without violating the well-established rule against systematic solicitation of professional employment for lawyers and without soliciting a blanket waiver of privilege to be given before it can be known by the client to what disclosures the waiver may extend. Such a waiver is objectionable, in the opinion of the committee, because it tends to weaken the sense of responsibility between lawyer and client. In the opinion of the committee, the question should therefore be answered in the affirmative.

In so answering, the committee is mindful of the fact that the legal profession exists for service, and not for its own sake; but the committee believes that the profession renders its best aid to business, and conforms to public policy, when it maintains high standards of professional dignity and propriety.

Nor does the question, in the opinion of the committee, present a case of unavoidable conflict between a necessary business-practice and a rule of professional ethics. And in any event, the circular letter quoted is, in the opinion of the committee, to be disapproved in point of form, and its use should not be permitted by the lawyers for the association, because in any view of what may be practically necessary in order to accomplish the association's legitimate purposes, the letter contains unnecessary laudation of the lawyers.

QUESTION No. 174.

Advertising; Solicitation; Employment; Newspaper; Patent Attorney—Accepting employment from newspaper to compile information from public official sources, to be published as news, but with statement that it has been so compiled by the attorney, naming him and his profession.—Not disapproved.—An attorney at law, duly entitled to practice before the Commissioner of Patents and the Patent Office, is engaged by a newspaper to compile from official sources a list of the patents on inventions issued to residents of the community in which the newspaper is published. The newspaper publishes the information as news in its columns, and states that the list is compiled by the said attorney.

In the opinion of the committee, is there any impropriety in such public announcement that the list has been compiled by such attorney, naming him and designating him "patent attorney?"

ANSWER No. 174.

In the opinion of the committee, there is no impropriety in such announcement.

BOOK REVIEW.

JENKS' GOVERNMENT OF THE BRITISH EMPIRE.

The government of Great Britain is interesting to Americans, not only as all other experiments in government are interesting, but because of the fact that both governments sprang from a common political ancestry. All of our institutions, as well as our law, are Anglo-Saxon, and in order fully to understand the full significance of such important terms as militia, sheriff, justice of the peace, jury, county, franchises, seal, impeachment, habeas corpus, prerogative, charters, etc., lawyers are compelled to go back to the old Year Books of England.

For these reasons, among others, American lawyers will welcome the little handbook of Edward Jenks, Director of Legal Studies of the Law Society of England, entitled The Government of the British Empire. The work is very concise, yet covers the whole range of British constitutional government. It is a book for the

busy lawyer who cannot afford the time for the study of the more voluminous works of Dicey or Stubbs.

The first chapter of Mr. Jenks' work on The King—Emperor, is itself a valuable statement of the sources of military, executive, judicial, legislative and administrative powers. The powers once centering in the king have since been distributed among other officers who, although still representing the king, are nevertheless today practically responsible to the people in Parliament. The second chapter, on Constitutional Monarchy, is equally interesting, especially in its account of the development of parliamentary ideas, which is without doubt the greatest contribution of Anglo-Saxon jurisprudence to the public law and the institutions of the world.

Two chapters deal with organization of the territory of the empire into the United Kingdom, the Self Governing Dominions, the Empire of India and the Crown Colonies. Other chapters deal with The Imperial Cabinet, The Structure and Work of Parliament, The Fighting Services, The State and Treasury Offices, The Newer Departments, The King's Courts, The Established Churches and Local Self Government.

To show the original and independent character of the author's conclusion, we quote herewith his comment on the origin of the jury. The author says:

"It is another widely spread belief that the jury is of 'popular' origin, coming down from ancient days. It is nothing of the kind, but a royal privilege which could only be used in the king's courts; because no other courts could compel jurymen to serve. For long after its introduction it was most unpopular. One of the taunts of a French poet of the late Middle Ages against the rival English was, that they were 'judged by inquest,' i. e., jury, instead of by their 'peers,' or fellow vassals; and it was not until the sixteenth century that, as a contrast to the harsh and secret proceedings of the Star Chamber and the Court of High Commission, the jury became popular, even in England. In Scotland it made little way until much later; in Ireland it has had a stormy history. But in the colonies, which date since its triumph in England, and even, to a certain extent, in British India, it has long been regarded as one of the characteristic safeguards of liberty."

Printed in one volume of 369 pages; bound in cloth; and published by Little, Brown & Company, Boston, Mass.

HUMOR OF THE LAW.

Flivver: "What's the most you ever got out of your car?"

Second ditto: "I think seven times in one mile is my record."—*Purple Cow.*

"What is senatorial courtesy?"

"Senatorial courtesy," replied Senator Sorghum, "consists largely in remaining silent so ostentatiously that anybody can guess what unpleasant things you must be thinking about."—*Washington Star.*

In less than five minutes more than 50 per cent of the evidence gathered in the roundup of wartime prohibition violators disappeared under the very noses of Department of Justice agents at the Federal Building in Philadelphia. With the rat-tat-tat of popping corks like a machine gun in action, 100 bottles of beer samples, gathered by agents from saloons selling beer, "let go" in the rooms of the Department of Justice, sprinkling impartially scurrying women stenographers and excited agents.

"Save the evidence," shouted Chief Investigating Agent Clark, leading his men to the attack. In spite of streams of fizzing beer which landed impartially on faces and shirt bosoms, fingers were thrust into the necks of the insurgent flasks, while other agents hunted cups and bowls to catch the fleeing evidence.—*St. Louis Star.*

A man from the north of Scotland was on holiday in Glasgow. On Sunday evening he was walking along Argyll street when he came upon a contingent of the Salvation Army, and a collection bag was thrust in front of his nose. He dropped a penny into it.

Turning up Queen street he encountered another contingent of the Salvation Army, and again a smiling "lass" held a collection bag in front of him.

"Na, na!" he said. "I gied a penny tae a squad o' your folk roon' the corner jist the noo."

"Really?" said the lass. "That was very good of you. But, then, you can't do a good thing too often. And, besides, you know, the Lord will repay you a hundredfold."

"Aweel," said the cautious Scot, "we'll jist wait till the first transaction's finished before we start the second."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adoption**—Legal Relationship. — Adoption establishes legal relation of parent and child, including obligation of parent to support child. —In re Ballou's Estate, Cal., 183 Pac. 440.

2. **Assault and Battery**—Forcible Retaking.—Seller in conditional sale, being justified in retaining possession without process of law only where possession can be secured peaceably, is liable for assault in forcible retaking.—Silverstein v. Kohler & Chase, Cal., 183 Pac. 451.

3. **Bankruptcy** — Involuntary Petition. — Though a court of bankruptcy expressed an opinion indicating its purpose to dismiss an involuntary petition, yet where no order of dismissal was drawn, as directed by the opinion, the petition in bankruptcy is not dismissed, and remains pending.—In re C. Jutte & Co., U. S. C. C. A., 258 Fed. 422.

4.——Uniform Sales Act.—Under contract with county commissioners, providing that contractor, now bankrupt, should furnish all materials and labor and complete highway, and that estimates should be made once a month of the amount and value of "material in place on the ground," title to brick which had been bought by bankrupt, delivered and stacked in piles, partly on and partly off the highway, in position to be used, was in the bankrupt, though included in the estimate made, even if regarded as a sale, in view of Uniform Sales Act (Gen. Code Ohio, §§ 8381-8456).—In re Schilling, U. S. D. C., 258 Fed. 489.

5. **Bills and Notes**—Bona Fide Holder.—The assignee of a note as collateral for present and subsequent debts is, as regards subsequent debts, a bona fide holder of the note only as to such of those debts as are incurred before maturity of the note.—Sonoma County Nat. Bank v. Skinner, Cal., 183 Pac. 464.

6.——Parol Promise.—Where defendant made a note at request and for sole benefit of plaintiff trust company, in reliance upon its contemporary parol promise that he would not be liable, but that company would look to the payee and endorser of maker's original note, company was not a holder of later note for value, as defendant was a mere accommodation maker, within Negotiable Instruments Act.—Lackawanna Trust Co. v. Carlucci, Pa., 107 Atl. 693.

7. **Brokers**—Construction of Contract.—Contracts to pay broker a commission are to be construed and applied according to the same principles that govern other contracts.—Smith v. Robinson, Ky., 214 S. W. 771.

8. **Carriers of Goods**—Interstate Commerce. —Under the Interstate Commerce Act, as amended June 29, 1906, § 2 (Comp. St., § 8569), an interstate carrier can neither recover freight charges nor pay the owner any allowance for services in connection with transportation, except as provided in schedules previously filed.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., Pa., 107 Atl. 680.

9. **Carriers of Live Stock**—Animals in Transit.—Act Cong. June 29, 1906 (Comp. St., §§ 8651-8654), "to prevent cruelty to animals in transit," does not contemplate a divided, dual duty, but a single, unitary one to feed and water cattle in interstate transit, and the shipper may not escape liability for a part of the feed so furnished by the carrier under government inspection, because shipper placed a part of the required feed in the car without such inspection, prior to shipping.—Pennsylvania R. Co. v. Swift & Co., U. S. C. C. A., 258 Fed. 289.

10. **Carriers of Passengers** — Accident. — when an accident is caused by defective appliances, or lack of appliances, or something pertaining to the means of transportation, a presumption of negligence arises, and it is incumbent upon carrier to show that it used every precaution which human skill, care and foresight could provide. De Marchi v. Central R. Co. of New Jersey, Pa., 107 Atl. 703.

11. **Commerce**—Public Service Commission.—Where plaintiff railroad, engaged in interstate commerce, agreed with defendant, operating a plant facility, to pay for switching cars according to a schedule filed by plaintiff until adjustment by Interstate Commerce Commission, and plaintiff canceled agreement before schedule was brought to commission's attention, and schedule was for rates less than value of services, its cancellation did not oust jurisdiction of commission to determine validity of cancellation and allowances for past transactions.—Pittsburgh & L. E. R. Co. v. South Shore R. Co., Pa., 107 Atl. 680.

12. **Constitutional Law**—Compact.—The federal Constitution is a compact established by the people of the United States and not by the states in their sovereign capacity.—In re Opinion of the Justices, Me., 107 Atl. 673.

13.——Federal Trade Commission.—Act Sept. 26, 1914, § 5 (Comp. St., § 8836e), giving the Federal Trade Commission power to stop unfair methods of competition in commerce and declaring the same unlawful, is not an unlawful delegation of legislative and judicial power;

Congress having by the act declared the public policy applicable to the situation.—Sears, Roebuck & Co. v. Federal Trade Commission, U. S. C. C. A., 258 Fed. 307.

14.——Intent.—In the construction of constitutions, the intention of the lawmakers, when ascertained, must govern.—Hudson v. Hopkins, Okla., 183 Pac. 507.

15.——Political Decision.—Who is the sovereign de jure or de facto of a country is a question for the political department of the government, and the decision by that department in this country is conclusive upon the courts.—Agency of Canadian Car & Foundry Co. v. American Can Co., U. S. C. C. A., 258 Fed. 363.

16.——Treaty.—If a treaty is invalid because in violation of, or inconsistent with the Constitution, the court, in a proper case where the rights of citizens are involved, may so declare.—United States v. Samples, U. S. D. C., 258 Fed. 479.

17. **Contracts**—Applicable Law.—The validity of a transaction whereby a trust company became the holder of a railroad's bonds as security for the railroad's note, and the status of the trust company as such holder, are to be determined by the law of the state of Missouri; the transaction having been a Missouri transaction.—Mississippi Valley Trust Co. v. Railway Steel Spring Co., U. S. C. C. A., 258 Fed. 346.

18.——Executory.—On the renunciation of an executory contract before the day of performance, the injured party may sue immediately or wait till the time when the act was to be done.—Tipple v. Tipple, N. Y., 177 N. Y. Sup. 813.

19. **Corporations**—Minority Stockholders.—Stockholders, who are also directors, may not act to the injury of the minority stockholders.—Townsend v. Winburn, N. Y., 177 N. Y. Sup. 757.

20.——Ratification.—A corporation may ratify an unauthorized agreement of another person made in its behalf, and by such ratification become bound.—Lawrence Coal Co. v. Shanklin, N. M., 183 Pac. 435.

21.——Ratification.—The president or other general officer of a corporation has prima facie power to do any act which the directors could authorize or ratify.—Hotel Woodward Co. v. Ford Motor Co., U. S. C. C. A., 258 Fed. 322.

22. **Courts**—State Decision.—The decision of the highest court of a state, construing its prior decisions, should be accepted by a federal court.—United States v. Cargill, U. S. D. C., 258 Fed. 458.

23. **Covenants**—Seisin.—Covenants of "seisin" and "good right to covey" are synonymous, and, if broken at all, are broken when made.—Rennie v. Gibson, Okla., 183 Pac. 483.

24. **Criminal Law**—Comments by Judge.—It is improper for court during trial to make any unnecessary comments, or to take any unnecessary action, which might tend to prejudice the rights of either of the parties litigant.—State v. Parks, N. M., 183 Pac. 433.

25.——Excess of Authority.—That the court exceeded its authority by providing that accused's imprisonment should be at hard labor does not invalidate the authorized portion of the sentence.—Dodge v. United States, U. S. C. C. A., 258 Fed. 300.

26.——Former Acquittal.—A plea of autrefois acquit is unavailing, unless the offense presently charge is precisely the same in law and fact as the former one relied on under the plea.—Kelly v. United States, U. S. C. C. A., 258 Fed. 392.

27.——Offense Defined.—The word "offense," while sometimes used in various senses, generally implies a crime or a misdemeanor infringing public as distinguished from mere private rights and punishable under the criminal laws, though it may also include the violation of a criminal statute for which the remedy is merely a civil suit to recover the penalty.—Commonwealth v. Brown, Pa., 107 Atl. 676.

28. **Customs and Usages**—Oral Contract.—Suit to enforce plaintiff's rights under an oral contract to procure oil and gas leases, and to be "carried for an eight" free in first well on each tract and in other wells drilled, the drilling expenses to be paid by other party if nonproducing or out of production, was not within rule requiring custom of particular place and local commercial usages to be pleaded before they can be proved.—Winemiller v. Page, Okla., 183 Pac. 501.

29. **Deeds**—Lex Rei Sitae.—The law of the state in which the land is situated must alone be looked to for the rules governing its alienation and transfer, and for the effect and construction of conveyances of all kinds.—Hotel Woodward Co. v. Ford Motor Co., U. S. C. C. A., 258 Fed. 322.

30.——Recording.—In view of Civ. Code, § 1056, where deeds were duly delivered, the fact that the grantor requested that they should not be recorded until the happening of some future event, does not affect their validity, for they would pass title without recordation.—Avery v. Avery, Cal., 183 Pac. 453.

31.——Restraint of Alienation.—Condition in deed of fee simple absolute against leasing or selling to negroes within a certain time is within the common law rule, of which Civ. Code, § 711, is declaratory, that "conditions restraining alienation, when repugnant to the interest created, are void."—Title Guarantee & Trust Co. v. Garrott, Cal., 183 Pac. 470.

32. **Divorce**—Custody of Children.—In a suit by the wife for limited divorce, where the court finds that her allegations are not sustained, it is without power to award her the exclusive custody of children and permanent alimony for her and their support.—Towson v. Towson, D. C., 258 Fed. 517.

33. **Elections**—Election Contest.—On appeal to supreme court in an election contest, appellant will not be permitted to raise questions of law not raised in court below, by amendment to original petition, adding certain averments and a prayer that the "entire return may be thrown out."—In re Padden's Election, Pa., 107 Atl. 694.

34. **Eminent Domain**—Plans for.—The execution of plans for a public improvement and the payment of damages for decrease in value of the property affected by the execution of plans is not the exercise of eminent domain.—Van Etten v. City of New York, N. Y., 124 N. E. 201, 226 N. Y. 483.

35.——Telegraph Poles.—A telegraph company is not precluded from condemning right to construct poles on a railroad right of way, because certain points on the right of way are not sufficiently wide to accommodate petitioner's poles, since compensation will be allowed only for portions of right of way actually taken.—Postal Telegraph-Cable Co. v. Florida East Coast Ry. Co., U. S. D. C., 258 Fed. 493.

36. **Equity**—Profiting by Evil.—Equity will not permit one to profit by his own guile, at least against the one upon whom the stratagem was practiced.—Schmitt v. Bethea, Fla., 82 So. 817.

37. **Evidence**—Alienation of Affections.—In an action by a wife for damages for alienation of affections, testimony of plaintiff that two weeks after writing her that he desired a separation from her, the husband said that defendants had told him that she had been untrue to him was not a part of the res gestae, but was hearsay, and should not have been admitted.—Gilmore v. Gilmore, S. D., 173 N. W. 865.

38. **Executors and Administrators**—Mismanagement.—The orphans' court did not abuse its discretion under Fiduciaries Act, § 53a, in removing an executor for mismanagement of estate, where he admitted that he had failed to pay debts and taxes, and that he had misappropriated part of rentals, and made no satisfactory explanation of his actions.—In re Miller's Estate, Pa., 107 Atl. 684.

39. **Exemptions**—Extradition. — In view of Code of Law D. C. 1901, § 930, a person may be arrested in the District of Columbia on a warrant from a federal district court and held for a reasonable time for extradition papers.—Stallings v. Splain, D. C., 258 Fed. 510.

40. **Fish**—Animals Ferae Naturae.—In view of Rev. St. Mo. 1909, § 6508, declaring that title to all "birds, fish, and game" shall be in the states, and one taking or killing them shall be deemed to have consented that title thereto shall so remain for the purpose of regulation and control, and § 6551, prohibiting pearl fishing at certain times, title to fresh water mussels, taken from a nonnavigable river, could not be acquired by the owner of the bed of the stream, so as to support an action for the value of the shells; the mussels being animals ferae naturae, title to which remained in the state, the term "fish" including shellfish, and "pearl fishing" referring to the capture of fresh water mussels.—Gratz v. McKee, U. S. C. C. A., 258 Fed. 335.

41. **Fraudulent Conveyances**—Husband and Wife.—The marital relationship does not prevent the employment of the husband by the wife on a reasonable salary to assist in a store which is her separate property, unless the agreement is fraudulent and operates to the prejudice of the creditors of either or both of them.—Carlsbad Mfg. Co. v. Kelley, W. Va., 100 S. E. 65.

42. **Game**—Migratory Birds.—The protection of migratory birds is properly the subject of negotiations between the United States and Canada and the treaty of December 8, 1916, is valid, and Act July 3, 1918 (Comp. St. 1918, Append., §§ 8837a-8837m), enacted to give effect to the treaty, is constitutional and valid.—United States v. Samples, U. S. D. C., 258 Fed. 479.

43. **Gifts**—Symbolic Delivery.—The delivery required to make a valid gift causa mortis may be symbolic or constructive.—In re Adler's Estate, N. Y., 177 N. Y. Sup. 820.

44. **Husband and Wife**—Alimony.—Alimony may be awarded a wife in a separate maintenance action, although both she and defendant husband were at fault.—Mattson v. Mattson, Cal., 183 Pac. 443.

45.——Marital Relation.—The marital relation does not prevent a husband from acting as agent for his wife.—Watring v. Gibson, W. Va., 100 S. E. 68.

46.——Property Settlements.—Property settlements between husband and wife when there is no fraud are highly favored in the law.—Hensley v. Hensley, Cal., 183 Pac. 445.

47. **Insurance**—Oral Contracts. — Oral contracts of insurance, as of an automobile against fire and theft, are legal and binding.—Sheridan v. Massachusetts Fire & Marine Ins. Co., Mass., 124 N. E. 249.

48.——Construction.—Doubtful terms in an insurance policy will not be construed in favor of the insurer.—Clover Crest Stock Farm v. Wyoming Valley Fire Ins. Co., N. Y., 177 N. Y. Sup. 771.

49.——Materiality of Risk.—Where the underwriter requests information in the application which, when given, amounts to a representation, such answer to a specific question is conclusively presumed to be material to the risk.—Snare & Triest Co. v. St. Paul Fire & Marine Ins. Co., U. S. C. C. A., 258 Fed. 425.

50. **Judgment**—Injunction. — An injunction will not be granted to restrain enforcement of a judgment at suit of a third person, on the ground that he will be liable over to the defendant therein, where the matter alleged as basis for the injunction would be available to complainant as a defense in an action against him.—Simonitsch v. Bruce, U. S. C. C. A., 258 Fed. 331.

51. **Landlord and Tenant**—Caveat Emptor.—In a lease of real estate, no covenant is implied that it shall be fit for occupation, which is true of a lease of a building for a dwelling house, in the absence of express agreement, or fraudulent representations or concealment; the lessee taking the demised premises as they exist, and the rule of caveat emptor applying.—Hopkins v. Murphy, Mass., 124 N. E. 252.

52.——Danger Signs.—Defendant who sublet rooms in a building with entrance to the upper floors between two stores to an open areaway to a stairway to upper rooms, and who permitted a tenant to construct a stairway to a cellar separated from areaway by a door, not averred to be improperly located or constructed, was not bound to maintain a danger sign to prevent persons entering the building to go to upper floors from being injured by going through door to cellar stairway.—Borman v. United Merchants' Realty & Improvement Co., Pa., 107 Atl. 682.

53. **Limitation of Actions**—Eviction.—Eviction, either actual or constructive, is necessary to set in motion the statute of limitations as to general covenants or warranty of title.—Webb v. Vaden, Okla., 183 Pac. 480.

54.——Resulting Trust.—Where trustee under resulting trust in land purchased with another's funds did not deny the title of such other's successor, or repudiate its claim to the land before the bringing of bill to enforce the trust, the statute of limitations did not run in his favor.—Boston & N. St. Ry. Co. v. Goodell, Mass., 124 N. E. 260.

55. **Master and Servant**—Contributory Negligence.—Where a workman, who used a ladder properly fitted with spikes on one side to prevent it from slipping when placed with that side underneath, left it in the evening properly placed, and used it the next morning without inspection, and was injured when it slipped, it having been misplaced during the night, he was guilty of contributory negligence.—Finan v. E. T. Mason Co., Pa., 107 Atl. 692.

56.——Joint Liability.—A master and servant are both liable in trespass for tortious acts of the servant done by express direction of the master.—Lisner v. Hughes, D. C., 258 Fed. 512.

57.——Respondeat Superior.—Neither ownership of an auto, nor the fact that the use and care of it was intrusted by the owner to an employe, renders the owner liable for injuries inflicted by it while in use by the employe for a purpose entirely unconnected with the owner's business.—Martinelli v. Bond, Cal., 183 Pac. 461.

58.——Workmen's Compensation Act. — In widow's proceeding under Workmen's Compensation Act for damages for death of her husband, a finding by Workmen's Compensation Board that he died of natural causes and that there was no evidence that there had been "any accident at all" is conclusive upon the court on appeal.—McGurrin v. Hudson Coal Co., Pa., 107 Atl. 687.

59.——Workmen's Compensation Act — The words "shown to have resulted from such refusal," in Workmen's Compensation Act of June 2, 1915, § 306e, modify preceding words, "injured" and "increase," so that claimant is not deprived of all compensation for his refusal to accept medical services from employer and his employment of a different physician, but only of compensation for an injury or increase of incapacity caused by the refusal, notwithstanding § 301, defining "injury" and "personal injury."—Neary v. Philadelphia & Reading Coal & Iron Co., Pa., 107 Atl. 696.

60. **Mechanics' Liens** — Statutory Requirements.—A statutory lien, given upon compliance with stated requirements, is not acquired, unless requirements are substantially complied with.—Ramsey v. Hawkins, Fla., 82 So. 823.

61. **Mines and Minerals**—Forfeiture.—An oil and gas lease on land in Kentucky held not forfeited for failure to promptly pay the stipulated rental on failure to drill a well within one year, where the letter containing it was undelivered and immediately on its return the money was deposited in bank, as the lease provided might be done.—Zeigler v. Hopkins, U. S. D. C., 258 Fed. 467.

62.——Surface Rights.—A deed conveying coal, with the necessary privileges through and under the lands for opening, mining, and marketing coal, and privilege of a road or right of way from main entrance to coal along a designated line, conferred no right to use surface outside area of underlying coal for erecting and maintaining a coal chute and other structures.—Horning v. Kraus, Pa., 107 Atl. 695.

63. **Negligence**—General Issue.—A particular act of negligence alleged is put in issue by a general denial, and plaintiff is limited to the act specified.—Galveston, H. & S. A. Ry. Co. v. Wilson, Tex., 214 S. W. 773.

64.——Proximate Cause.—One who negligently puts into operation a train of events which is likely to lead in a continuous sequence, to an injury which is the natural and probable result of the original act, is liable, although the injury was immediately caused by last link in chain of events.—Herman v. Markham Air Rifle Co., U. S. D. C., 258 Fed. 475.

65.——Wanton Injury.—A finding by a jury of wanton negligence necessarily involves a finding of simple negligence.—Illinois Cent. R. Co. v. Beavers, U. S. C. C. A., 258 Fed. 447.

66. **Patents** — Infringement. — Infringement should not be determined by the mere decision that the terms of a claim of a valid patent are applicable to defendant's device, but the question involves considerations of practical utility and substantial identity, and that must be quantitative as well as qualitative.—Silver & Co. v. S. Sternau & Co., U. S. C. C. A., 258 Fed. 448.

67. **Payment**—Check.—Fact that a bank to which a check had been sent for collection charged the drawer with amount of check and credited such amount to account of its correspondent bank does not constitute a payment precluding bank from later changing entry upon drawer's failure to pay the check.—Southern Stove Works v. Converse Sav. Bank, S. C., 100 S. E. 75.

68. **Pleading** — Conclusions. — In action against telegraph company for breach of contract to furnish telegraphic reports of a prize fight, allegations that plaintiffs were damaged in consequence of the failure and refusal of defendant to carry out its contract, without stating facts upon which such claim of damage was based, held mere conclusion of pleader.—Western Union Telegraph Co. v. Jeffries, Tex., 214 S. W. 781.

69. **Railroads**—Alienation of Franchise.—A railroad corporation cannot, merely of its own volition, sell, mortgage, or lease its property or franchise in such a way as to deprive itself of the power of accomplishing the ends for which it was created.—Attorney General v. Boston & A. R. Co., Mass., 124 N. E. 257.

70.——Independent Contractor.—A foreman of independent contractors, who as he was in the act of stepping from a board walk to a plank near the track, was struck by an engine approaching with light burning and bell ringing, held guilty of contributory negligence in failing to be on the lookout for his safety.—Sweatman v. Pennsylvania R. Co., Pa., 107 Atl. 697.

71.——Selling Assets.—A railroad corporation has no inherent or implied power to lease its property, but can do so only when, and to the extent, and in the manner authorized by the state.—Hampden Railroad Corporation v. Boston & M. R. R., Mass., 124 N. E. 254.

72.——Signals.—When it is apparent, or when in exercise of reasonable diligence it should be apparent to railroad company that a driver is unaware of his danger or cannot get out of the way, the company must use such precautions by warnings, application of brakes, or other means reasonably necessary to avoid injury, which requirement is not dispensed with merely by ringing engine bell.—Louisville & N. R. Co. v. English, Fla., 82 So. 819.

73. **Receivers**—Custody of Law.—Property in the hands of a receiver appointed by a court may not be interfered with, even to carry out private agreements, contracts, or trusts.—Mississippi Valley Trust Co. v. Railway Steel Spring Co., U. S. C. C. A., 258 Fed. 346.

74. **Replevin** — Damages. — Parties whose property was taken under replevin process are not entitled to recover interest on the value of the property which was destroyed while in possession of the plaintiff in replevin, together with damages for the withholding of the property.—Nahhas v. Browning, Cal., 183 Pac. 442.

75. **Sales**—Burden of Proof.—Where buyer of personal property under terms of written contract must necessarily perform certain obligations before seller is required to carry out a particular obligation under contract, seller, suing buyer for failure to carry out such obligations, need not allege performance of such particular obligation.—Bloodworth v. A. H. & F. H. Lippincott, Fla., 82 So. 827.

76.——Implied Warranty.—An implied warranty attaches, in the sale of an article by description or sample, that it shall be of the kind ordered.—Samuel v. Delaware River Steel Co., Pa., 107 Atl. 700.

77.——Statute of Limitations.—In action on notes for purchase of lumber, defendant could not resist payment on account of seller's lack of title to timber and his promise not to sue on notes until he had acquired title, where, by reason of lapse of time since defendant had cut and removed the timber, any claim to it by anyone was barred by statute of limitations.—Yeager v. Mansel, Pa., 107 Atl. 688.

78.——Warranty.—Where parties to a sale stipulate course to be pursued by buyer if warranty fails, such stipulation must be followed by him in seeking to enforce the warranty.—Moline Plow Co. v. Adair, Cal., 183 Pac. 499.

79. **Taxation**—Burden of Proof.—Special tax laws are construed strictly against the government, and it has the burden of proving that property is subject thereto.—In re Kean, N. Y., 177 N. Y. Sup. 789.

80.——Transfer Tax.—Where an order on report of transfer tax appraiser in estate of a testator, dying in 1902, leaving remainder interest in a trust fund to his son, with power of appointment, suspended taxation on such remainder, and a subsequent composition agreement between state comptroller and executors, with approval of attorney general, fixed tax on remainder, it was not a proper subject of appraisal in estate of son who had exercised power of appointment.—In re Lewisohn's Estate, N. Y., 177 N. Y. Sup. 799.

81. **Trade-Marks and Trade-Names**—Registration.—Registration of the mark, "Our Flag," for canned salmon and oysters is not precluded because the opposer had previously used several different flags in connection with the sale of the same kind of goods.—Alaska Packers' Ass'n v. Getz Bros. & Co., D. C., 258 Fed. 527.

82. **Trial**—Credibility of Witness.—Credibility of a witness is a question for the jury, and the court cannot assume the truthfulness of the unsupported testimony of an interested party.—San Jacinto Rice Co. v. Ulrich, Tex., 214 S. W. 777.

83. **Vendor and Purchaser** — Merchantable Title.—A marketable title to land is one that is fair of record and free from reasonable doubt.—Geray v. Mahnomen Land Co., Minn., 173 N. W. 871.

84. **Waters and Water Courses**—Domestic Use.—A city, for compensation supplying water for domestic use, impliedly warrants that it is wholesome.—Canavan v. City of Mechanicville, N. Y., 177 N. Y. Sup. 808.

85. **Wills**—Construction.—A surrogate may dismiss a proceeding for the construction of a will without prejudice of the parties, if he considers it inexpedient or unjust to finally determine the matter.—In re Freudenheim, N. Y., 177 N. Y. Sup. 795.

86.——Family Settlement.—Where a daughter contests her father's will, a family settlement between herself and her two brothers, two of the three executors, by which, in consideration of her withdrawal of the caveat, she receives absolutely a portion of the estate in lieu of a separate use trust provided by the will, is void, and will be set aside to permit renewal of the contest, pending which distribution will be stayed.—In re Schwehm's Estate, Pa., 107 Atl. 699.

87.——Intent.—The testator's intent must, if possible, be given effect, unless contrary to law.—In re Munroe, N. Y., 177 N. Y. Sup. 783.

88.——Words in Context.—The word "to" will be read into a codicil, and the word "revove" will be read as "revoke;" it clearly appearing from the context that such was the intention.—In re Wood's Ex'rs, N. Y., 177 N. Y. Sup. 825.